

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals

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For the State of Michigan, ex rel, MICHIGAN
DEPARTMENT OF ENVIRONMENTAL
QUALITY, Russell Harding, Director of the
Michigan Department of Environmental Quality,

Plaintiffs-Appellants,

Supreme Court No. 120139

Court of Appeals Docket No. 213707

Ingham County Circuit Court
Case No.: 97-85844 CE

V

WOODLAND OIL CO. INC., a Michigan
Corporation, BAY OIL CO., INC., a Michigan
Corporation, jointly and severally,

Defendants-Appellees.

**DEFENDANT-APPELLEE WOODLAND OIL COMPANY, INC.'S
BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

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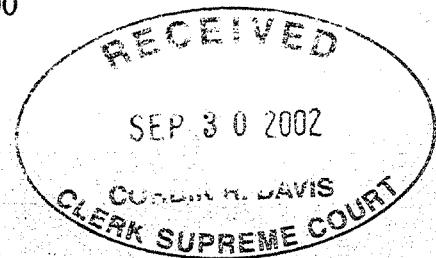


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STATEMENT OF BASIS OF JURISDICTION

Defendant-Appellee Woodland Oil Company, Inc. agrees with Plaintiffs' statement as to this Court's jurisdiction of the present appeal.

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COUNTER-STATEMENT OF QUESTION PRESENTED

- I. WHETHER THE COURT OF APPEALS PROPERLY FOUND THAT MCL 324.20140(1)(a) BARRED THE PLAINTIFFS' BELATED COST-RECOVERY ACTION WHICH THEY FILED EIGHT YEARS AFTER WOODLAND OIL COMPANY AND BAY OIL COMPANY INITIATED THE PHYSICAL ON-SITE CONSTRUCTION ACTIVITIES FOR THE REMEDIAL ACTION APPROVED BY THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES?

The Trial Court Would Say "Yes."

The Court of Appeals Would Say "Yes."

The Plaintiffs Would Say "No."

The Defendant-Appellee Bay Oil Company Would Say "Yes."

The Defendant-Appellee Woodland Oil Company Says "Yes."

COUNTER-STATEMENT OF FACTS

Plaintiffs appeal from the Court of Appeals' July 27, 2001 Opinion which affirmed the Trial Court's grant of summary disposition in favor of the Defendants-Appellants Woodland Oil Company, Inc. and Bay Oil Company, Inc. (hereafter Woodland and Bay, respectively) on the grounds that the six (6) year statute of limitations, MCL 324.20140(1)(a) barred the Plaintiffs' cost-recovery action. This statute states that one must commence an action for the recovery of response activity costs "... within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility" The following paragraphs describe the facts relevant to the application of this statute to the Plaintiffs' tardily filed cost recovery action.

1. THE DEPARTMENT APPROVED THE DEFENDANTS' REMEDIAL ACTION PLAN ON APRIL 20, 1989.

Woodland Oil Company and Bay Oil Company, through their environmental consultant, prepared a "Remedial Action Plan" (Appellees' App. 1b), and submitted this plan, through legal counsel, to the then Michigan Department of Natural Resources (MDNR). (Appellees' App. 8b). This seven (7) page document, which begins in the form of a letter, is entitled "Remedial Action Plan Frankfort Bulk Plant." *Id.* It states, among other things:

"The remedial action plan for the Frankfort facility is in response to the DNR request for clean-up at the site. The project area is a (sic) active petroleum product bulk plant located on M-22 in Frankfort." (*Id.*)

After noting that an investigation of the site occurred in 1983 and that the "initial leak was recovered," the Defendants' environmental consultant, Gosling Czubak Associates stated:

"The proposed remedial action should be composed of three phases: soil removal, groundwater investigation, and groundwater treatment." (*Id.*)

The remedial action plan then described the first phase of the clean-up project:

“Proposed Site Remedial Action
Phase I – Soil and Product Removal” (*Id.*).

The clean-up plan then described the activities which would occur to remove and dispose of the soil and petroleum products. (Appellees’ App. 1b-2b).

The MDNR’s project manager, Mr. Robert Kettner, received, reviewed, and approved Woodland’s and Bay’s “work plan.” (Appellants’ App. 24a) Upon behalf of the Department, he approved Phase I of the clean-up plan regarding the soil and product removal and directed that these activities proceed. (Appellants’ App. 24a, 58a-59a).

Mr. Robert Kettner acknowledged that Defendants had submitted a clean-up plan to the Department and that the Department approved it. (Appellants’ App. 58a-59a). In fact, the Department performed the same kind of clean-up activities which Defendants had performed:

“Q. And it’s because you internally categorized the funds as interim response. **But in fact the final clean-up activity undertaken by the department is soil excavation, which is the same method of clean up that was undertaken in 1989; isn’t that right?**”

“A. I guess I understand your question correctly that, yes, **we did the same thing they did, correct.** They just didn’t do enough.”

“Q. Oh, I understand that. But in terms of saying it’s something - - **is it interim response or is it something else, in fact, the final clean-up modality is soil excavation by the department?**”

“A. **Its all the clean-up that we intend to do at the site.**” (Appellants’ App. 135a-136a) (emphasis added).

Mr. Kettner, upon behalf of the Department, admitted that “excavation” is “construction.” (Appellants’ App. 44a-45a). Mr. Kettner also admitted that clean-up, such as the removal of the contaminated soil, is part of “remedial action:”

“Q. And when he removed contaminated soil, that’s part of a **clean-up**, isn’t it?”

"A. **Right.**"

"Q. And **clean-up is part of remedial action**, isn't it?"

"A. Yes." (Appellants' App. 135a). (emphasis added)

Also, Mr. Steve Cunningham, the MDEQ's enforcement coordinator, admitted that Defendants initiated remedial action in 1989:

"Q. Oh, I don't – I'm not contesting that Mr. Cunningham. What I am saying is, though, that **it was the initiation of work aimed at remediation that was undertaken in 1989.**"

"A. **That would be a true statement.**"

"Q. I mean, they initiated the work. What you are saying is they did not complete it, but **there is no question they initiated remedial action 1989.**"

"A. **That would be true.**" (Appellees' App. 9b-11b) (emphasis added).

2. DEFENDANTS' INITIATED PHYSICAL ON-SITE CONSTRUCTION ACTIVITIES.

The Plaintiffs, through the MDNR's project manager, Mr. Robert Kettner, admitted that soil excavation is "construction." (Appellants' App. 44a-45a). Defendants initiated that activity in 1989. (Appellants' App. 58a-59a; Appellees' App. 10b-11b.)

Defendants removed approximately 2,500 cubic yards of fuel-contaminated soil. (Appellants' App. 60a-61a). In or about the month of August of 1989, Woodland and Bay also disconnected the entire bulk plant, emptied the tanks and removed the tanks. Defendants then reconditioned the tanks and built a new facility after the completion of excavation. (Appellants' App. 61a).

The above facts are not disputed. Defendants initiated their physical on-site construction activity in 1989, almost eight years before the Plaintiffs filed their claim for the recovery of their response activity costs.¹

3. WOODLAND PERFORMED ITS SOIL EXCAVATION AND OTHER ACTIVITIES TO CLEAN UP A HAZARDOUS SUBSTANCE RELEASED INTO THE ENVIRONMENT.

The 1989 soil excavation was “aimed at remediation...” (Appellees’ App. 10b-11b). The Defendants’ removal of the contaminated soil was part of a “clean-up.” Further, “... clean-up is part of remedial action ...” (Appellants’ App. 135a). The Department deemed it necessary for the Defendants to perform the excavation. (Appellants’ App. 24a). The MDNR performed the same kind of clean-up, i.e., soil excavation, which the Defendants performed in 1989. (Appellants’ App. 135a).

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¹ The Plaintiffs filed this action in April of 1997 (Appellants’ App. 1a). Although the Plaintiffs incurred costs before July of 1991, they have not sought to recover those and have limited their claim to the costs allegedly incurred in and after July of 1991 (Appellants’ App. 167a).

ARGUMENT

I. **THE COURT OF APPEALS PROPERLY FOUND THAT MCL 324.20140(1)(a) BARRED THE PLAINTIFFS' BELATED COST-RECOVERY ACTION WHICH THEY FILED EIGHT YEARS AFTER WOODLAND OIL COMPANY AND BAY OIL COMPANY INITIATED THE PHYSICAL ON-SITE CONSTRUCTION ACTIVITIES FOR THE REMEDIAL ACTION APPROVED BY THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES.**

A. **INTRODUCTION.**

This case involves the Plaintiffs' claim for "response activity costs" (Appellees' App. 12b-13b, 18b-21b). According to MCL 324.20140(a)(1), the Plaintiffs had to file their Complaint:

"For the recovery of response activity costs and natural resources damages pursuant to section 20126a(1)(a), (b), or (c), within 6 years of **initiation of physical on-site construction activities for the remedial action selected or approved by the department** at a facility, except as provided in subdivision (b)." (emphasis added).

Plaintiffs have predicated their appeal upon their claimed distinction between "response activities" and "remedial action," and have contended that both the trial court and the Court of Appeals misconstrued section 20140(1)(a) and other statutes. The facts and law clearly indicate that the lower courts correctly construed and applied section 20140(1)(a).

In Frankenmuth Ins v Marlette Homes, 456 Mich 511; 573 NW2d 611 (1998), this Court reinstated a circuit court's grant of summary disposition because a statute of repose barred the suit therein, stating:

"The Court of Appeals correctly stated the principles that govern the analysis of a case of this sort:

"The primary rule of statutory construction is to determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished. *Gross v*

General Motors Corp, 448 Mich 147, 158-159; 528 NW2d 707 (1995). Where a statute is clear and unambiguous, judicial construction is precluded. *Mino v McCarthy*, 209 Mich App 302, 304; 530 NW2d 779 (1995). If judicial interpretation is necessary, the Legislature's intent must be gathered from the language used, and the language must be given its ordinary meaning. In determining Legislative intent, statutory language is given the reasonable construction that best accomplishes the purpose of the statute. *Id.* at 304-305. Statutes of limitation, along with statutes of repose, are construed to advance the policy that they are designed to promote. They prevent stale claims and relieve defendants of the protracted fear of litigation. *Witherspoon v Guilford*, 203 Mich App 240, 247; 511 NW2d 720 (1994)." [*Id.*, at 515, quoting 219 Mich App 169-170.]

Section 20140(1)(a) is clear and unambiguous. It requires only that the following events occur in order to trigger the running of the statute of limitations:

1. Initiation of physical, on-site construction activities;
2. Performance of such activities for remedial action;
3. Selection or approval of such action by MDEQ.

The record clearly indicates that Defendants:

1. Initiated physical, on-site construction activity (i.e., excavation) in 1989;
2. Excavated the contaminated soil as part of their "remedial action;"
3. The MDEQ (then known as the MDNR) approved the Defendants' "Remedial Action Plan."

Plaintiffs' construction of part 201 of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.20101 *et seq*; and its predecessor, MCL 299.601 *et seq*, runs afoul of the principles discussed in *Frankenmuth Ins.*, *supra* and the record in this case. Defendants request the Court to find that the lower courts correctly concluded that section 20140(1)(a) bars Plaintiffs tardy response activity costs claim.

B. STANDARD OF REVIEW.

This Court reviews a grant of summary disposition de novo. Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether a statute of limitation bars a cause of action is question of law that is reviewed under the same standard. Moll v Abbott Laboratories, 444 Mich 1, 26; 506 NW2d 816 (1993). Likewise, statutory interpretation is a question of law that this Court reviews de novo. Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n, 456 Mich 590, 610; 575 NW2d 751 (1998).

C. SECTION 20140(1)(A) BARS PLAINTIFFS' STALE COST RECOVERY CLAIM.

As stated above, the following events trigger section 20140(1)(a):

1. Initiation of physical, on-site construction activities;
2. Performance of such activities for remedial action;
3. Selection or approval of such action by the MDEQ.

The record shows that the above three (3) events occurred. The record also shows that Plaintiffs waited too long to file this action.

1. Defendants Initiated Physical On-Site Construction Activities.

Plaintiffs, through the MDEQ's environmental quality manager, admitted that soil excavation is "construction." (Appellants' App. 44a-45a). Defendants initiated that activity in 1989. (Appellants' App. 58-59a; Appellees' App. 10b-11b).

Defendants removed approximately 2,500 cubic yards of fuel-contaminated soil. (Appellants' App. 60a-61a). On or about August of 1989, Defendants also disconnected the entire bulk plant, emptied the tanks and removed the tanks. Defendants then reconditioned the tanks and built a new facility after the completion of excavation. (Appellants' App. 61a).

The above facts are not disputed. It is clear that Defendants initiated the physical on-site construction activity in 1989, almost eight years before Plaintiffs filed their claim for the recovery of their response activity costs.

Plaintiffs have primarily predicated their appeal upon their characterization of the "limited nature" of Defendants' removal of 2,500 cubic yards of contaminated soil (Plaintiffs' Brief on Appeal, p 2).² Plaintiffs contend that because this "limited" excavation did not completely and fully remove all of the contamination from the site, it was only an "interim" response activity rather than a "remedial action" which would have triggered the running of the statute of limitations contained within section 20140(1)(a). (Plaintiff-Appellants' Brief on Appeal, pp 2, 7, 13-15). The essence of Plaintiffs' argument is that because Defendants' removal of 2,500 cubic yards of contaminated soil did not result in a completely clean site, the excavation must have necessarily been an "interim" measure rather than the kind of "remedial action" contemplated within section 20140(1)(a). (Plaintiff-Appellants' Brief on Appeal, pp 13-14)

Plaintiffs' argument is fundamentally flawed because it fails to address the specific terms of the statute at issue. Subsection 20140(1)(a) is not triggered upon the **completion** of the remedial action. It does not begin to run when one has achieved a **complete cleanup**. Rather, it begins to run upon the "**initiation**" of the on-site cleanup activities pursuant to a plan approved by the Department. Plaintiffs have ignored the statute's use of the word "initiation."

² The MDEQ, through its environmental contractor, removed approximately 2,000 tons, i.e., 2,000 cubic yards, of soil in 1992 (Appellants' App. 48a). See, subargument F, *infra*, p. 21-22 which discusses, among other things, the fact that Woodland and Bay excavated more than their alleged share of the contaminated soil.

The Plaintiffs have based their argument, in principal part, upon what the Plaintiffs contend are similar definitions of certain terms in CERCLA, a federal statute, and part 201 of Michigan's Natural Resources and Environmental Protection Act (Plaintiffs' Brief, p. 16). Notwithstanding an analysis of these partially comparable (and in at least one significant instance, strikingly different)³ definitions, the Plaintiffs failed to recognize that CERCLA requires one to commence a "remedial action" cost recovery lawsuit "within 6 years after **initiation** of physical on-site construction of the remedial action...." 42 USC 9613(g)(2)(b) (emphasis added). This CERCLA provision is substantially similar to MCL 324.20140(1)(a) which is triggered upon the "initiation of physical on-site construction activities for the remedial action." In both instances, it is the initiation of the physical on-site remedial action activities which begins the running of the statute of limitations.⁴

Plaintiffs spend considerable time arguing that the Court of Appeals erred in concluding that an "interim response activity" contemplates some type of "quick" response to a release. (Plaintiffs' Brief on Appeal, pp 9-10.) However, it is clear that the Court of Appeals' ultimate determination – that an "interim response activity" is an activity which one performs before the development and implementation of a plan for remedial action (Appellants' App. 198a) – is consistent with the other relevant provisions of Part 201 and is consistent with the context within which the Legislature has used these terms.

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³ See, Brief, *infra*, p. 18.

⁴ *California v Hyampom Lumber Co.*, 903 F Supp 1389, 1392-1393 (ED Cal, 1995) [rejecting an argument similar to the instant Plaintiffs that there needed to be a final governmental approval of a "permanent" plan before there could be any "remedial action."]

As in other cases involving the meaning of statutory language, the meaning of the terms at issue depend upon their context. As stated in People v Vasquez, 465 Mich 83, 89; 631 NW2d 711 (2001):

“‘[T]he meaning of statutory language, plain or not, depends on context.’ *King v St. Vincent’s Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991). ‘Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: ‘[i]t is known from its associates,’ see Black’s Law Dictionary (6th ed), at 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting.’ *Tyler v Livonia Pub Schs*, 459 Mich 382, 390-391; 590 NW2d 560 (1999). ‘[I]n seeking meaning, words and clauses will not be divorced from those which precede and those which follow.’ *Sanchick v Michigan State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955). ‘It is a familiar principle of statutory construction that words grouped in a list should be given related meaning.’ *Third Nat’l Bank in Nashville v Impact Ltd, Inc.*, 432 US 312, 322; 97 S Ct 2307; 53 L Ed 2d 368 (1977).”

In the instant case, the Court of Appeals correctly noted that an “interim response activity” means the “cleanup or removal... **prior** to the implementation of a remedial action” (Appellant’s App. 198a) (emphasis added). Indeed, the Plaintiffs have specifically acknowledged that as described in MCL 324.20101(1)(u), interim response activities are taken “prior to” a remedial action. (Plaintiffs’ Brief on Appeal, p. 9). Furthermore, Plaintiffs have recognized that interim response activities often occur before the approval of a remedial action plan, and have acknowledged that interim response activities address “immediate concerns and threats.” (Plaintiffs’ Brief on Appeal, p. 19).

Woodland’s and Bay’s remedial action plan indicated that the site had been investigated in 1983, that the initial release of fuel oil had been recovered, and that the recovery of additional free product continued until 1985 (Appellees’ App. 1b). After Defendants performed this cleanup and removal of the hazardous substance, they, through their environmental consultant, prepared their remedial action plan. *Id.* The MDNR approved

that plan, and directed Defendants to excavate “until encountering the groundwater table or until clean soils are encountered, sampled and confirmed.” (Appellants’ App. 24a). **The implementation of this plan is consistent with the performance of a 1982-1989 era “response activity” and what has been known from 1990 to the present as a “remedial action.”** Beginning the running of the statute of limitations upon the commencement of the excavation work, pursuant to the approved plan, is consistent with the unambiguous terms of section 20140(1)(a).

An analysis of the context of the statute of limitations, MCL 324.20140(1)(a) also supports the Court of Appeals’ decision and should lead this Court to affirm the dismissal of the Plaintiffs’ tardily filed action. As noted above, the Legislature has defined “interim response activity” as something which occurs “... prior to the implementation of a remedial action” MCL 324.20101(u). The context of the statute of limitations indicates when the “remedial action” begins: This occurs upon the “initiation of physical on-site construction activities....” MCL 324.20140(1)(a). The Legislature said that the statute of limitations begins to run when one begins to perform physical on-site construction activities to perform the remedial action approved by the MDEQ. The context of the subject statute indicates that “remedial action” means “physical on-site construction activities.” One begins to perform “remedial action” when one begins to perform physical on-site construction activities. Woodland and Bay submitted a plan for the performance of such on-site construction activities. The MDEQ approved it. Woodland and Bay then excavated 2,500 yards of soil, dismantled the plant and reconstructed it. These physical on-site construction activities began in 1989. That is when the statute of limitations began to run.

2. **Defendants Performed Their Soil Excavation And Other Activities To Clean Up A Hazardous Substance Released Into The Environment.**

The second element of section 20140(1)(a)'s trigger is the performance of the on-site construction activities for "remedial action." "Remedial action" is defined as:

"Remedial action" includes, but is not limited to, **cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare or to the environment.**" [MCL 324.20101(cc) (emphasis added)]

The predecessor to NREPA's Part 201, which was in effect in 1989, defined the phrase "response activity" as:

"Response activity" means an activity necessary to protect the public health, safety, welfare, and the environment, and includes, but is not limited to, evaluation, **cleanup, removal, containment, isolation, treatment, monitoring, maintenance, replacement of water supplies, and temporary relocation of people as determined to be necessary by the governor or the governor's designee.**" [MCL 299.603(j). (emphasis added)]

The 1989 soil excavation was "aimed at remediation..." (Appellees' App. 10b-11b).

Defendants' removal of the contaminated soil was part of a "clean-up." The Department's project manager has admitted that "cleanup" is part of "remedial action." (Appellants' App. 135a). The Department deemed it necessary for Defendants to perform the excavation. (Appellants' App. 24a). The MDEQ performed the same kind of clean-up, i.e., soil excavation, which Defendants performed in 1989. (Appellants' App. 135a).

Plaintiffs have claimed that Woodland's and Bay's 1989 soil excavation was either an "interim response activity" or a "response activity," rather than a "remedial action." In addition to not directly addressing the issue (see, section 1, above, regarding Plaintiffs' failure to acknowledge that the statute of limitations begins to run upon the "initiation" of

on-site cleanup activities), this part of Plaintiffs' argument has ignored the fact that the terms "response activity" and "remedial action" are interchangeable. The Legislature uses them that way. The lower courts simply enforced the Legislature's intent. They did what Frankenmuth, supra, told them to do. 456 Mich at 515.

Plaintiffs sought a recovery of "response activity costs" (Appellees' App. 13b, 18b-21b). The relevant statute of limitations refers to "response activity costs" and "remedial action." MCL 324.20140(1)(a). Defendants performed a "clean-up." The phrase "response activity" includes, among other things, a "clean-up." MCL 299.603(j). The phrase "response activity" included, among other things, "remedial action." MCL 324.20101(bb). The phrase "remedial action" includes, among other things a "clean-up." MCL 324.20101(z).

The Legislature has interchangeably used the words "response activity" and "remedial activity." It has used each phrase within the statute which is the subject of this action. Each environmental event (response activity and remedial action) includes, among other things, a "clean-up." Defendants performed a clean-up. Both the trial court and the Court of Appeals correctly determined that Defendants initiated clean-up construction activities in order to protect the environment and remove the fuel-contaminated soil in 1989, more than seven and one-half years before Plaintiffs belatedly filed their "response activity costs" claim.

3. The Department Approved Defendants' Remedial Action Plan In April Of 1989.

Woodland's and Bay's environmental consultant prepared a "Remedial Action Plan." (Appellees' App. 1b). The Department called the "remedial action plan" a "work plan," and

approved it. (Appellants' App. 24a). A "remedial action plan" is a "**work plan** for performing remedial action under ... (Part 201)." MCL 324.20101(aa) (emphasis added). The trial court correctly found that the undisputed evidence showed that the Department had approved Defendant's plan to excavate the contaminated soil in April of 1989. Likewise, the Court of Appeals correctly found that Woodland had prepared a three phase "remedial action" plan to remove the contaminated soil. (Appellants' App. 198a).

Subsection (1)(a) of section 20140 required the MDEQ to file its complaint no later than six years after Defendants began their 1989 MDEQ-approved clean-up. Plaintiffs waited too long. They filed their complaint in April of 1997, almost eight years after the approved clean-up. Accordingly, the trial court properly granted summary disposition in favor of Woodland Oil Company and Bay Oil Company under subsection (1)(a). Likewise, the Court of Appeals properly affirmed the trial court's ruling. Accordingly, this Court should allow the lower courts' rulings to stand and deny Plaintiffs' request for relief on appeal.

D. PLAINTIFFS' ARGUMENT IS CONTRARY TO THE UNAMBIGUOUS TERMS OF MCL 324.20140(1)(A).

MCL 324.20140(1)(a) states in pertinent part:

"The limitation period for filing actions under this part is ... within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility..."

Plaintiffs argue that Defendant Woodland's 1989 excavation of 2,500 yards of soil in 1989 was not a "remedial action" either "under part 201" or "consistent with part 201" because that cleanup work occurred before the adoption of MCL 324.20118, (response activities and remedial action plans) and part 7 ("cleanup criteria") of the response activity rules, 1990 AACS R299.5701, et seq., effective March 30, 1995 and July 12, 1990,

respectively. (Plaintiffs' Brief on Appeal, pp. 13-14). However, the words "under part 201" or "consistent with part 201" do not appear after the phrase "remedial action" in MCL 324.20140(1)(a). Plaintiffs have impermissibly read additional terms into the unambiguous language of the statute.

In Sun Valley Foods Co. v Ward, 460 Mich 230, 236; 596 NW2d 199 (1999), *rehearing den'd*, 461 Mich 1205 (1999), this Court said:

"The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). See also *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent....' *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 15; 545 NW2d 642 (1996). Only where the statutory language is ambiguous may court properly go beyond the words of the statute to ascertain legislative intent. *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984)."

The statute at issue is not ambiguous. Its meaning is clearly expressed. The Court must enforce the statute as written. The Court of Appeals did so. On the other hand, Plaintiffs have requested this Court to read the phrase "under part 201" or "consistent with part 201" into subsection (1)(a). In accordance with the above admonition, no such judicial construction is required or permitted.

In Brown v Michigan Health Care Corp, 463 Mich 368, 376; 617 NW2d 301 (2000), this Court held that the Workers' Compensation Appellate Commission and the Court of Appeals had erroneously read a non-existent provision into MCL 418.905. Likewise, Helder v Sruba, 462 Mich 92, 98-102; 611 NW2d 309 (2000) reversed the Court of Appeals' interpretation of MCL 436.22f to grant an insurer a "lack of notice" defense to a claim which

was not a defense included within the unambiguous language of that statute. Contrary to Brown, and Helder, Plaintiffs have requested this Court to read additional terms into an unambiguous statute. Woodland requests the Court to reject Plaintiffs' argument and affirm the Court of Appeals.

Also, the clear and unambiguous terms of both the predecessor to, and the reenacted version of, subsection (1)(a) belie Plaintiffs' contention that the "remedial action" which triggers the running of the limitations period must be "consistent with" or "under part 201." The following table illustrates the disparity between the Legislature's consistent expression of its intent to bar a cost-recovery action unless it is commenced within six years after the initiation of physical on-site construction activities for the remedial action selected or approved by the MDEQ, and Plaintiffs' version of the statute:

1990 Public Acts 234, section 17(1)(a), being MCL 299.617(1)(a):

Sec. 17.(1) Except as provided in subsection (2), the limitation period for filing actions under this act shall be as follows:

(a) For the recovery of response activity costs and natural resources damages pursuant to section 12(2)(a), (b), or (c), within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility, except as provided in subdivision (b).

1994 Public Acts 451, section 20140(1)(a), being MCL 324.20140(1)(a):

Sec. 20140.(1) Except as provided in subsection (2), the limitation period for filing actions under this part is as follows:

(a) For the recovery of response activity costs and natural resources damages pursuant to section 20126(2)(a), (b), or (c), within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility, except as provided in subdivision (b).

2000 Public Acts 254, section 20140(1)(a), being MCL 324.20140(1)(a):

Sec. 20140.(1) Except as provided in subsections (2) and (3), the limitation period for filing actions under this part is as follows:

(a) For the recovery of response activity costs and natural resources damages pursuant to section 20126a(1)(a), (b), or (c), within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility, except as provided in subdivision (b).

Plaintiffs' Construction of subsection (1)(a):

Sec. 20140.(1) Except as provided in subsection (2), the limitation period for filing actions under this part is as follows:

(a) For the recovery of response activity costs and natural resources damages pursuant to section 20126(2)(a), (b), or (c), within 6 years of initiation of physical on-site construction activities for the remedial action **[under part 201]** selected or approved by the department at a facility, except as provided in subdivision (b).

or

Sec. 20140. (1) Except as provided in subsection (2), the limitation period for filing actions under this part is as follows:

(a) For the recovery of response activity costs and natural resources damages pursuant to section 20126(2)(a), (b), or (c), within 6 years of initiation of physical on-site construction activities for the remedial action **[consistent with part 201]** selected or approved by the department at a facility, except as provided in subdivision (b).

As illustrated above, when the Legislature recodified the statute in 1994 it did not add the words "under part 201" or "consistent with part 201" after the phrase "remedial action." In 2000 PA 254, the Legislature amended subsection (2) and added subsections 3 and 4 in response to the Court of Appeals' Opinion in Shields v Shell Oil Co, 237 Mich App 682; 604 NW2d 719 (1999), *rev'd* 463 Mich 939; 621 NW2d 215 (2000). This amendment did not change subsection (1)(a). For eleven (11) years, before and after both Shields and the trial court's and the Court of Appeals' decisions in the instant case, the Legislature has consistently and unambiguously expressed its intent in subsection (1)(a).

The Court should also reject the Plaintiffs' CERCLA-based argument (Plaintiffs' Brief, p. 16) because there is a significant difference between the federal and state definitions

of at least one of the terms at issue. A Michigan court should not rely upon CERCLA and federal case law construing it where there are distinctions between the federal and state statutes. City of Port Huron v Amoco Oil Co, 229 Mich App 616, 624; 583 NW2d 215 (1998), lv granted, 461 Mich 873 (1999), order vacated and lv den, 462 Mich 854 (2000).

This difference between CERCLA and Part 201 is that:

- CERCLA defines “remedial action” to include “... those actions consistent with permanent remedy taken instead of or in addition to removal actions” 42 USC 9601(24).
- The Michigan Legislature did not so define “remedial action.” Rather, in Michigan, “remedial action” includes, among other things, “removal.” MCL 324.20101(1)(cc).

The Court should reject the Plaintiffs’ request to re-write Michigan law by incorporating a distinct and different federal definition into Part 201. Brown, supra, and Hedler, supra. In Michigan, remedial action includes, among other things, the removal of contaminated soil. Woodland began to do this in 1989 after the Department approved Woodland’s remedial action plan. The Plaintiffs filed their lawsuit almost eight (8) years later, contrary to MCL 324.20140(1)(a).

E. PLAINTIFFS’ ARGUMENT BASED UPON SHIELDS, SUPRA IS INCONSISTENT WITH THE APPLICABLE FACTS AND LAW.

Plaintiffs also predicate their argument upon Shields v Shell Oil Company, 463 Mich 939; 621 NW2d 215 (2000) in which this Court enforced the Legislature’s amendment of what had been subsection 20140(2) and which became subsection 20140(3), and found that actions for recovery of response activity costs which were incurred before July 1, 1991 were subject to the July 1, 1994 limitation period. (Plaintiffs’ Brief on Appeal, pp 19-23). The Court should reject this argument because:

- The Court of Appeals did not decide that the MDEQ's cause of action had accrued before all of the elements of its claim were present. Instead, the Legislature decided that the statute of limitations began to run upon the **initiation** of the cleanup activities performed pursuant to a plan which the MDEQ approved. MCL 324.20140(1)(a);
- Unlike Shields, where the plaintiff allegedly incurred its "response activity costs" after the expiration of the statute of limitations at issue therein,⁵ the instant Plaintiffs first incurred their response activity costs before the statute of limitations expired. While limiting their claim to the costs incurred after July of 1991, the Plaintiffs incurred costs before then (Appellants' App. 167a). As of August 12, 1994, the MDEQ claimed to have incurred approximately \$364,000 in costs (Appellants' App. 37a). The Plaintiffs clearly incurred their costs before the statute of limitations expired.

Plaintiffs have suggested that as a result of the Court of Appeals' Opinion, Plaintiffs' cost-recovery claim has been barred before they even incurred any of their costs. **This is not true in this case.** The MDNR approved Defendants' work plan in April 1989, and work occurred shortly thereafter. Six years from the initiation of construction was in or around April of 1995. As noted above, the MDEQ began to incur (or at least has limited its lawsuit to) expenses incurred in or around 1991. The MDEQ had four years after beginning to incur those expenses within which to file the lawsuit. The MDEQ's claim was not barred before it began to incur any expenses.

The statute of limitations contemplated the ongoing nature of cleanup activities and envisioned the need for one to file successive cost-recovery actions. MCL 324.20140(1)(b) provides:

"(b) For 1 or more subsequent actions for recovery of response activity costs pursuant to section 20126, at any time during the response activity, if commenced not later than 3 years after the date of completion of all response activity at the facility." (emphasis added.)

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⁵ These "costs" were the \$38,500 credit applied toward one's land contract purchase price pursuant to a December of 1994 Consent Judgment. Shields, *supra*, 237 Mich App at 685.

If Plaintiffs had timely filed their cost-recovery action, they could have, if necessary, filed a subsequent action within three years after the date of completion of all response activities at the facility. If Plaintiffs had incurred additional costs after the conclusion of a hypothetically timely filed cost-recovery action, they could have filed another cost-recovery action in accordance with subsection 1(b). However, Plaintiffs failed to timely file their cost recovery claim. This means that they are unable to follow the Legislature's plan regarding the filing of a subsequent cost-recovery action.

Shields did not involve subsection 1(a). The facts also indicate that Plaintiffs had more than enough time within which to bring their cost-recovery action consistent with subsection 1(a). However, rather than do so, they have now made a belated and convoluted argument which is contrary to both the facts and law applicable to this matter. The Court should reject Plaintiffs' argument and affirm the decision below.

F. THE LOWER COURTS' DECISIONS ARE CONSISTENT WITH THE LEGISLATURE'S INTENT TO BAR A COST RECOVERY ACTION FILED MORE THAN SIX YEARS AFTER THE INITIATION OF PHYSICAL ON-SITE CONSTRUCTION ACTIVITIES FOR THE REMEDIAL ACTION APPROVED BY THE DEPARTMENT.

Plaintiffs have claimed that the Court of Appeals' decision is contrary to Part 201's intent that liability for response activity costs should be imposed upon the persons who are responsible for the environmental contamination (Plaintiffs' Brief on Appeal, pp 24-25). However, as noted at the outset of this Brief, where a statute, like subsection (1)(a) is clear and unambiguous, "judicial construction is precluded." Frankenmuth Insurance, *supra*, 456 Mich at 515; *see also*, Sun Valley Foods Co, *supra*, 460 Mich at 236. Frankenmuth Insurance recognized that statute of limitations prevent stale claims and relieve an allegedly liable party of the protracted fear of litigation. 456 Mich at 515. Section 20140(1)(a) clearly states the

Legislature's intent: one must file a cost recovery action within six (6) years after the beginning of physical on-site construction activities for the remedial action approved by the MDEQ. Both the trial court and the Court of Appeals found that the instant Plaintiffs had failed to do so. The record clearly shows that the lower courts correctly concluded that the instant Plaintiffs failed to follow the Legislature's clear directive.

Woodland acknowledges that the Legislature has expressed its intent that a person responsible for the contamination is liable for the response activities to address that contamination. MCL 324.20102(f) and MCL 324.20126(1)(a) and (b). However, the Legislature also intended that one seeking to recover the cost of such activities must do so in a timely manner. MCL 324.20140. The instant Plaintiffs' failure to file their action in accordance with this statute is not a sufficient basis for construing the statute contrary to its clear and unambiguous terms.

The Plaintiffs have directly and inferentially stated Woodland and Bay are the "liable parties" which failed to perform a complete clean-up at the site (Plaintiffs' Brief on Appeal, pp. 3, 17-18, 21, 23-24). The essence of the Plaintiffs' argument is that the Court should misconstrue section 20140(1)(a) and adopt the Plaintiffs' convoluted argument in order to ensure the entry of a judgment against Woodland and Bay. In addition to rejecting the Plaintiffs' argument for the reasons stated earlier in this Brief, it is also important for the Court to consider the Plaintiffs' argument in light of the following:

- The Trial Court granted Woodland and Bay's Motion for Summary Disposition on the ground that the statute of limitations barred the Plaintiffs' belatedly filed action. MCR 2.116(C)(7). (Appellants' App. 178a - 188a). There has been no judicial consideration of, or ruling upon, the substantive merits, if any, of the Plaintiffs' claim.

- The real estate which is the subject of this case, and the bulk plant affixed to it, have been owned and operated by three parties: Total Petroleum⁶ for many years until 1977; Woodland, from 1977 until 1987; and Bay from 1987 to 1993 (Appellants' App., 43a). The Department's project manager, Mr. Robert Kettner, has approximated the apportionment for the contamination as follows: 50 percent for Total Petroleum, 40 percent for Woodland and 10 percent for Bay (Appellants' App, 94a - 97a and 106a - 107a).
- Mr. Kettner is "... convinced that ... during Total's operation there had been releases to the environment at the location." (Appellants' App., 97a).
- In April of 1996, the Plaintiffs settled their claim against Total for \$287,500 (Plaintiffs' First Amended Complaint, ¶57 - Appellees' App., 20b). This amount was substantially less than one-half (1/2) of the total amount of the Plaintiffs' allegedly incurred response activity costs and interest thereupon (Plaintiffs' First Amended Complaint, ¶56 - Appellees' App., 20b).
- Woodland and Bay removed 2,500 cubic yards of soil, disconnected the bulk plant, emptied and removed the tanks, reconditioned their equipment and built a new facility.
- The Department, through its environmental contractor, excavated approximately 2,000 tons, i.e., 2,000 cubic yards, of contaminated soil at a different location at the site (Appellants' App., 48a). The Department's contractor acknowledged that none of the previously excavated areas which had contained clean back-fill had been "re-excavated." (Capone dep., pp. 64-65; Appellees' App., 39b) The Department's 1995 excavation and removal of 2,000 cubic yards of soil was at a lower depth than Woodland and Bay's 1989 excavation. The Department's excavation, for which it seeks reimbursement in this action, occurred at a depth and at a location which is consistent with a discharge (i.e., "pump out") of petroleum products by Total Petroleum. (Capone dep., pp. 27-28 and 71-73; Appellees' App. 30b and 41b, respectively).

The instant Plaintiffs' request that this Court should re-write the subject statute is predicated upon both an unfounded assertion contrary to the above facts and an erroneous reading of the relevant sections of part 201. Woodland requests the Court to reject the Plaintiffs' argument and affirm the dismissal of the Plaintiffs' claim.

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⁶ The Plaintiffs alleged that Woodland purchased the site in 1977 from "Total Petroleum Oil Company, Inc." (Plaintiffs' First Amended Complaint, ¶¶16 and 17 - Appellees' App., 14b).

CONCLUSION AND RELIEF REQUESTED

The Director of the Michigan Department of Natural Resources requested Defendants to "undertake corrective actions to remedy the environmental problems at this site." (Appellants' App. 22a-23a). The Department, through its Director, said that "these actions include removal of contaminated soils and floating petroleum product at the site." *Id.* Woodland Oil Company and Bay Oil Company, through their consultant, prepared a work plan regarding those activities. The Department approved that work plan on April 20, 1989 (Appellants' App. 24a). Defendants Woodland and Bay then excavated 2,500 yards of contaminated soil in accordance with the approved work plan.

Subsection 20140(1)(a) clearly applies to Plaintiffs' tardily filed cost-recovery action. Both the trial court and the Court of Appeals correctly applied the clear and unambiguous terms of that statute and found that it barred the instant cost-recovery action. Plaintiffs' argument is contrary to the Legislature's directive regarding the timely filing of cost-recovery actions. For these reasons, the Court should affirm the dismissal of the Plaintiffs' Complaint.

Respectfully submitted,

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